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 Before the
 Federal Communications Commission
 Washington, D.C. 20554

In the Matter of)	
)	
Amendment of section 73.202(b),)	
Table of Allotments,)	MM Docket No. 99-26
FM Broadcast Stations.)	RM-9436
(Pitkin, Lake Charles, Moss Bluff, and Reeves,)	RM-9651
Louisiana, and Crystal Beach, Galveston,)	RM-9652
Missouri City, and Rosenberg, Texas.))	
)	

REPORT AND ORDER

(Proceeding Terminated)

Adopted: August 30, 2000

Released: September 8, 2000

By the Chief, Allocations Branch:

1. The Allocations Branch has before it the Notice of Proposed Rule Making in this proceeding issued in response to a Petition for Rule Making filed by Panther Broadcasting of Louisiana ("Panther Broadcasting"). 14 FCC Rcd 2275 (1999). Arkansas Wireless Co. ("Arkansas Wireless") filed a Counterproposal, Reply Comments and Reply Comments to Counterproposals. Tichenor License Corporation ("Tichenor") filed Comments and Counterproposal, Reply Comments, Supplemental Reply Comments and a Statement for the Record. El Dorado Communications, Inc. ("El Dorado") filed Reply Comments and Opposition to Counterproposal, Second Reply Comments and Opposition to Counterproposals, and Supplement to Reply Comments and Opposition to Counterproposals. For the reasons discussed below, we are substituting Channel 285C3 for Channel 285A at Rosenberg, Texas, reallocating Channel 285C3 to Missouri City, Texas, and modifying the license of Station KOVA to specify operation on Channel 285C3 at Missouri City. In order to accommodate this upgrade and reallocation, we are substituting Channel 287A for Channel 285A at Galveston, Texas, reallocating Channel 287A to Crystal Beach, Texas, and modifying the license of Station KLTO to specify operation on Channel 287A at Crystal Beach. To accommodate Channel 287A at Crystal Beach, we are also substituting Channel 285C3 for Channel 287C2 at Lake Charles, Louisiana, reallocating Channel 285C3 to Moss Bluff, Louisiana, and modifying the license of Station KZWA to specify operation on Channel 285C3 at Moss Bluff.

Background

2. At the request of Panther Broadcasting, the Notice proposed the allotment of Channel 285A to Pitkin, Louisiana, as a first local service. In response to that Notice, we received two counterproposals. The first counterproposal was filed by Arkansas Wireless proposing the allotment of Channel 285A to Reeves, Louisiana, as a first local service. The second counterproposal was filed by Tichenor, licensee of Station KOVA, Channel 285A, Rosenberg, Texas, and Station KLTO, Channel 285A, Galveston, Texas. In that counterproposal, Tichenor proposes the substitution of Channel 285C3 for Channel 285A at Rosenberg, reallocation of Channel 285C3 to Missouri City, Texas, and modification of its Station KOVA license to specify operation on Channel 285C3 at Missouri City. In order to accommodate the Channel 285C3 upgrade at Missouri City, Tichenor proposes the substitution of Channel 287A for Channel 285A at

Galveston, reallocation of Channel 287A to Crystal Beach, Texas, and modification of its Station KLTO license to specify operation on Channel 287A at Crystal Beach. In order to accommodate Channel 287A at Crystal Beach, Tichenor also proposes the substitution of Channel 285C3 for Channel 287C2 at Lake Charles, Louisiana, reallocation of Channel 285C3 to Moss Bluff, Louisiana, and modification of the Station KZWA license to specify operation on Channel 285C3 at Moss Bluff. In regard to this latter substitution, Tichenor has provided a statement from B&C Broadcasting, Inc., licensee of Station KZWA, consenting to the proposed downgrade and reallocation.

3. El Dorado, corporate parent of the licensees of Station KXTS, Beaumont, Texas, and Station KQQK, Galveston, Texas, filed Reply Comments in opposition to the Tichenor counterproposal. In its Reply Comments, El Dorado first asserts that the Notice was “flawed ab initio” because Panther Broadcasting did not submit an expression of continuing interest in its proposed allotment or demonstrate that Pitkin is actually a community for allotment purposes. Both of these requirements were expressly set forth in the Notice. As such, the Notice should be rescinded and the counterproposals filed in this proceeding should be processed as new petitions for rule making. In addition, El Dorado contends that the proposed reallocation to Missouri City cannot be implemented due to FAA constraints that would eliminate all potential transmitter sites. El Dorado also argues that Missouri City proposal does not advance the Commission’s allotment priorities and would exacerbate an anticompetitive situation in the Houston market due to a concentration of ownership. Finally, El Dorado suggests a “relationship” among Panther Broadcasting, Roy E. Henderson and Tichenor in which Panther Broadcasting would file the instant petition for rule making thereby enabling Tichenor to file its counterproposal without being subject to counterproposals. We will discuss each of these arguments below.

Discussion

4. We will not rescind the Notice in this proceeding. The Notice proposed the allotment of Channel 285A to Pitkin, Louisiana, which was in compliance with Commission technical requirements and would have provided a first local service to Pitkin. As noted by El Dorado, there was an issue as to whether Pitkin has the requisite community status to warrant an allotment. To this end and consistent with Allocation Branch practice, the Notice specifically requested comment on this issue. See Andalusia, Alabama, and Holt, Florida, 15 FCC Rcd 2029 (2000). The fact that Panther Broadcasting did not respond to this issue or file the requisite continuing expression of interest in applying for the proposed allotment was fatal only to its proposal for Channel 285A at Pitkin. Any Notice of Proposed Rule Making complying with Section 553(b) of the Administrative Procedure Act and proposing an allotment in compliance with Commission technical requirements is neither flawed nor void ab initio because the proponent subsequently fails a requirement for allotment of the proposed channel. In addition, it would not be conducive to the efficient transaction of Commission business to dismiss or otherwise defer action on valid counterproposals filed in response to the Notice in this proceeding.

5. El Dorado also suggests that Roy E. Henderson and Tichenor jointly participated in the filing of the Panther Broadcasting Petition for Rule Making so that Tichenor could then file a counterproposal to upgrade its Station KOVA. In support of this contention, El Dorado refers to a provision in the sales agreement by which Tichenor acquired Station KOVA from Henderson. According to this agreement, Henderson would assist Tichenor in obtaining an upgrade for Station KOVA and would receive additional consideration if Station KOVA is upgraded. According to El Dorado, this “supports the theory of complicity” between Tichenor and Henderson and provides a “motive for Henderson to act in collusion” with Tichenor in the filing of the initial Panther Broadcasting Petition for Rule Making. There is nothing in the record of this proceeding or any other proceeding, beyond the above speculation by El Dorado, which would suggest that Tichenor participated in the filing of the Panther Broadcasting Petition for Rule

Making. In regard to the filing of a Petition for Rule Making, any false statement to the Commission expressing an interest in filing an application for an allotment is a material misrepresentation. See Amendment of Section 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission Processes ("Abuses of Processes"), 5 FCC Rcd 3911 (1990). However, the fact that a party initially expresses an interest in a proposed allotment and does not file a requisite subsequent expression of interest is not sufficient evidence, by itself, of misrepresentation or abuse of process. See Abuses of Processes at 3914-15. With respect to this proceeding, McHenry T. Tichenor, Jr., president and chief executive officer of Hispanic Broadcasting Corporation, parent company of Tichenor License Corporation, submitted a "Statement Under Penalty of Perjury." In that Statement, McHenry Tichenor categorically states that he was unaware of the filing of the Petition for Rule Making by Panther Broadcasting. McHenry Tichenor goes on to state that he had no knowledge or information regarding the principals of Panther Broadcasting or of any relationship between Panther Broadcasting and Roy E. Henderson. Finally, he states that that Hispanic Broadcasting did not pay or promise any consideration to Panther Broadcasting for not filing comments in response to the Notice in this proceeding. In view of the Statement and the absence of evidence suggesting that Tichenor participated in a filing containing a material misrepresentation, we do not believe that there is any reasonable basis for concluding that Tichenor has engaged in any abuse of process in this proceeding.

6. After careful review of the engineering exhibits submitted by El Dorado and Tichenor, we do not believe that the proposed Channel 285C3 allotment at Missouri City would result in insurmountable electromagnetic interference (EMI) to air navigation. In its exhibit, El Dorado's airspace consultant contends that the proposed operation could cause "potential intermodulation interference" to four existing FAA localizer navigation facilities. In response, the airspace consultant for Tichenor recognizes potential EMI interference to these FAA localizer navigation facilities at the proposed site for the Channel 285C3 at Missouri City. However, this consultant correctly notes the accepted practice in these situations is to install an FM antenna with a radiation pattern which would eliminate EMI to the localizer navigation facility or change the frequency of the localizer navigation facility. In regard to the latter solution, the airspace consultant has identified 12 unused localizer frequencies. In a related vein, El Dorado's airspace consultant also suggests that the proposed structure would exceed the height permissible under FAA requirements and would "warrant a Determination of Hazard." The airspace consultant further states that to avoid exceeding the permissible height, the proposed transmitter would have to be located either north or east of the proposed site. Although the Commission generally presumes in rule making proceedings that a technically feasible site is available, that presumption is rebuttable. See San Clemente, California, 3 FCC Rcd 6728 (1988), appeal dismissed sub. nom. Mount Wilson FM Broadcasters, Inc. v. FCC, 884 F2d 1462 (D.C. Cir. 1989). We will not allot a channel where there is no site that would meet FAA criteria and the Commission's spacing requirements. In this proceeding, El Dorado has addressed the proposed structure only at the proposed site and has indicated that it may be necessary to relocate its transmitter to a site either north or east of the proposed site. This is not sufficient evidence to indicate that there are no satisfactory sites available that would meet FAA criteria. Cf. Sebring and Miami, Florida, 10 FCC Rcd 6577 (1995).

7. Finally, the proposed allotment of Channel 285C3 to Missouri City would not result in a "dominant oligopolistic market share" of the Houston radio market as suggested by El Dorado. In support of this argument, El Dorado notes that Tichenor is wholly owned by Hispanic Broadcasting Corporation ("Hispanic Broadcasting"). Tichenor and Hispanic Broadcasting already own six radio stations in the Houston radio market (four FM and two AM). In addition, El Dorado notes that Clear Channel Communications, Inc. owns a 29% non-voting equity interest in Hispanic Broadcasting. In this connection, El Dorado states that due to the recent merger between Clear Channel Communications and Jacor Communications, Inc., Clear Channel now owns stations in the Houston market. As such, El Dorado

concludes that a reallocation of Channel 285C3 to Missouri City would result in a concentration in the Houston radio market "significantly" impeding competition. We disagree. Clear Channel's 29% non-voting equity interest in Hispanic Broadcasting is non-attributable and would not warrant further inquiry with respect to de facto control of Hispanic Broadcasting. See In the Matter of Shareholders of AMFM, Inc. and Clear Channel Communications, Inc., FCC 00-296, released September 1, 2000. Thus, there is no basis for the allegation that Clear Channel's and Hispanic Broadcasting's assets in Houston should be aggregated and that, so aggregated, they would pose a threat to competition. We disagree, therefore, with El Dorado's belief that the proposed allotment of Channel 285C3 to Missouri City will have an adverse effect on competition in the Houston radio market.

8. At the outset, we are dismissing the proposal for a Channel 285A allotment at Pitkin, Louisiana. Panther Broadcasting did not file an expression of continuing interest in applying for this allotment as specifically required by the Notice. Instead, we are substituting Channel 285C3 for Channel 285A at Rosenberg, Texas, reallocating Channel 285C3 to Missouri City, Texas, and are modifying the license of Station KOVA to specify operation on Channel 285C3 at Missouri City.¹ This will result in a preferential arrangement of allotments as required by the Commission in Modification of FM and TV Authorizations to Specify a New Community of License ("Community of License"), 4 FCC Rcd 4870 (1989); recon., 5 FCC Rcd 7094 (1990). In reaching this determination, we compared the existing versus the proposed arrangement of allotments using the FM allotment priorities set forth in Revision of FM Assignment Policies and Procedures, 90 FCC2d 88 (1988).² This will provide Missouri City with a first local service and a net gain in service to 1,798,950 persons in an area of 2,962 square kilometers. The population that will lose service as a result of this reallocation will continue to receive at least five aural services and Rosenberg will continue to receive local service from Station KRTX. See Atlantic and Glenwood, Iowa, 10 FCCC Rcd 3160 (1995); see also LaGrange and Rollingwood, Texas, 10 FCC Rcd 3337 (1995).

9. We recognize that Missouri City is located within the Houston Urbanized Area. In this regard, we are concerned with the potential migration of stations from lesser-served rural areas to well-served urban areas. For this reason, we will not blindly apply a first local service preference of the FM allotment priorities when a station seeks to reallocate its channel to a suburban community in or near an Urbanized Area. In making such a determination, we apply existing precedents. See e.g. Huntington Broadcasting Co. v FCC, 192 F2d 33 (D.C. Cir. 1951); RKO General, Inc. (KFRC), 5 FCC Rcd 3222 (1990); Faye and Richard Tuck, 3 FCC Rcd 5374 (1988). In essence, we consider the extent the station will provide service to the entire Urbanized Area, the relative populations of the suburban and central city, and, most important, the independence of the suburban community.

10. In this situation, Missouri City, with a population of 36,176 persons, is entitled to a preference as a first local service. While this population is approximately 2% of the population of Houston, we consider 36,176 persons to be a substantial population and such a percentage has not precluded favorable consideration as a first local service. See e.g. Ada, Newcastle and Watonga, Oklahoma, 11 FCC Rcd 16896 (1996); Bay St. Louis and Poplarville, Mississippi, 10 FCC Rcd 13144 (1995); and Scotland Neck and Pinetops, North Carolina, 7 FCC Rcd 5113 (1992). We also note that the proposed 70 dBu contour

¹ The reference coordinates for the Channel 285C3 allotment at Missouri City, Texas, are 29-33-11 and 95-26-35.

² The FM allotment priorities are: (1) First fulltime aural service; (2) Second fulltime aural service; (3) First local service; and (4) Other public interest matters. Co-equal weight is given to Priorities (2) and (3).

will encompass less than 28% of the Houston Urbanized Area. Cf. Headland, Alabama, and Chattahoochee, Florida, 10 FCC Rcd 10352 (1995). In any event, the Commission has stated that these factors have less significance than evidence of independence. Headland, Alabama, and Chattahoochee, Florida, *supra*. Consistent with the factors set forth in Faye and Richard, Tuck, *supra*, we conclude that Missouri City is not dependent upon Houston Urbanized Area for its existence. Missouri City is an incorporated community with a mayor and city council. The local government provides fulltime police and fire departments as well as a public works authority which constructs and maintains city streets, parks and recreation services. Missouri City has its own public school system and a local newspaper. Tichenor has also identified Missouri City businesses, religious and civic organizations.

11. In order to allot Channel 285C3 to Missouri City, it is necessary to make two other channel substitutions. First, we are substituting Channel 287A for Channel 285A at Galveston, Texas, reallocating Channel 287A to Crystal Beach, Texas, and are modifying the Station KLTO license to specify operation on Channel 287A at Crystal Beach.³ This will provide Crystal Beach with a second local service while Galveston will continue to receive local service from four stations. In order to allot Channel 287A to Crystal Beach, we are substituting Channel 285C3 for Channel 287C2 at Lake Charles, Louisiana, reallocating Channel 285C3 to Moss Bluff, Louisiana, and are modifying the Station KZWA license to specify operation on Channel 285C3 at Moss Bluff.⁴ Moss Bluff, located within the Lake Charles Urbanized Area, is a Census Designated Place with a population of 8,039 persons. This will be a first local service for Moss Bluff. Cf. East Los Angeles, Long Beach and Frazier Park, California, 10 FCC Rcd 2864 (1995). In making these latter two substitutions, we realize that there would be a net loss of service to approximately 257,000 persons. In this instance, this would not be fatal to the Missouri City reallocation proposal. This entire population will continue to receive at least five aural services.⁵ Against this loss of service, the proposed reallocation to Missouri City, in addition to being a first local service, will result in a net service gain to 1,798,950 persons.

12. In order to allot Channel 285C3 to Missouri City, it is necessary to deny the competing Counterproposal filed by Arkansas Wireless for a Channel 285A allotment at Reeves, Louisiana. This would have provided a first local service to Reeves. Reeves is a Census Designated Place with a population of 188 persons and a Channel 285A allotment would have served 24,186 persons. This entire population receives five reception services. In contrast, the Channel 285C3 allotment at Missouri City will provide a first local service to a community of 36,176 persons and a net service gain to 1,798,950 persons. See West Liberty and Richwood, Ohio, 6 FCC Rcd 6084 (1991); Three Oaks and Bridgman, Michigan, 5 FCC Rcd 1004 (1990); see also Okmulgee, Nowata, Pawhuska, Bartlesville, Bixby, Oklahoma, and Rogers, Arkansas, 10 FCC Rcd 12014 (1995); Bowling Green and Elizabethtown, Kentucky, and Ferdinand, Indiana, 8 FCC Rcd 2097 (1993). We conclude that the allotment to Missouri City is preferred.

13. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and

³ The reference coordinates for the Channel 287A allotment at Crystal Beach, Texas, are 29-29-36 and 94-31-33.

⁴ The reference coordinates for the Channel 285C3 allotment at Moss Bluff, Louisiana, are 30-27-06 and 93-08-39.

⁵ The Commission has considered five or more reception services to be "abundant." Family Broadcasting Group, 53 RR2d 662 (Rev. Bd. 1983), *rev. denied* Fcc83-559 (Comm'n Nov. 29, 1983); see also LaGrange and Rollingwood, Texas, 10 FCC Rcd 3337 (1995).

307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission Rules, IT IS ORDERED, that effective October 23, 2000, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

<u>Community</u>	<u>Channel No.</u>
Lake Charles, Louisiana	241C, 258C1, 279C1
Moss Bluff, Louisiana	285C3
Crystal Beach, Texas	268C3, 287A
Galveston, Texas	293C
Missouri City, Texas	285C3

14. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Tichenor License Corporation for Station KOVA, Rosenberg, Texas, IS MODIFIED to specify operation on Channel 285C3 at Missouri City, Texas, subject to the following conditions:

- (a) Within 90 days of the effective date of this Order, the licensee shall submit to the Commission a minor change application for construction permit (FCC Form 301), specifying the new facility;
- (b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620 of the Rules;
- (c) Nothing contained herein shall be construed to authorize a change in transmitter site or avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Rules.

15. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Tichenor License Corporation for Station KLTO, Galveston, Texas, IS MODIFIED to specify operation on Channel 287A at Crystal Beach, Texas, subject to the following conditions:

- (a) Within 90 days of the effective date of this Order, the licensee shall submit to the Commission a minor change application for construction permit (FCC Form 301), specifying the new facility;
- (b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620 of the Rules;
- (c) Nothing contained herein shall be construed to authorize a change in transmitter site or avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Rules.

16. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of B&C Broadcasting, Inc. for Station KZWA, Lake Charles,

Louisiana, IS MODIFIED to specify operation on Channel 285C3 at Moss Bluff, Louisiana, subject to the following conditions:

- (a) Within 90 days of the effective date of this Order, the licensee shall submit to the Commission a minor change application for construction permit (FCC Form 301), specifying the new facility;
- (b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620 of the Rules;
- (c) Nothing contained herein shall be construed to authorize a change in transmitter site or avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Rules.

17. Pursuant to Section 1.1104(1)(k) and (2)(k) of the Commission's Rules, any party seeking a change in community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rulemaking fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, the licensees receiving an upgrade and/or change in community of license are required to submit a rulemaking fee in addition to the fee required for the application to effect the upgrade and/or change in community of license.

18. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send a copy of this Report and Order BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to:

B&C Broadcasting, Inc.
730 Enterprise Boulevard
P.O. Box 699
Lake Charles, Louisiana 70602

20. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

21. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 418-2177.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau